No. 85-1513

IN THE

Supreme Court of the United States

October Term, 1985

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EDWIN W. EDWARDS, in his official capacity as Governor of Louisiana, et al.,

Appellants,

v.

DON AGUILLARD et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE RABBINICAL ALLIANCE OF AMERICA, THE CATHOLIC CENTER THE FREE METHODIST CHURCH OF NORTH AMERICA, THE HONORABLE ROBERT K. DORNAN, THE HONORABLE WILLIAM E. DANNEMEYER, THE HONORABLE PATRICK L. SWINDALL, AND THE COMMITTEE ON OPENNESS IN SCIENCE, AMICI CURIAE, IN SUPPORT OF THE APPELLANTS

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INTEREST OF AMICI CURIAE[1]

This case presents important issues concerning academic freedom and constitutional prohibitions on state censorship of scientific and essentially nonreligious cur-

[1]Counsel of record to the parties in the cases described above have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

ricular material in the public schools. *Amici Curiae* believe that balanced treatment for creation-science and evolution-science promotes a constitutional legislative purpose and primary effect of advancing academic freedom by making available to students and teachers a realistic set of options to explore, discuss, and evaluate within the marketplace of ideas.

The Rabbinical Alliance of America is a fraternal organization of 500 Orthodox Rabbis representing synagogues across the United States. The Rabbinical Alliance, through its numerous conferences and publications, assists its members and supporters in addressing social and political issues of concern to the Orthodox Jewish Community. The Catholic Center is an educational and research organization affiliated with Catholic lay offices at the state and local level and committed to promoting Catholic lay activism affecting church and society. The Catholic Center publishes the nationally circulated periodical, *The Light*, which examines public policy issues of concern to the Catholic laity. The Free Methodist Church of North America, founded in 1860, represents 980 congregations in the United States with a total membership of 81,621 persons. *Amici Curiae* believe this case raises important issues of freedom of expression, the right of parents to direct the education of their children, and religious freedom.

Also joining as *Amici Curiae* are The Honorable William E. Dannemeyer, United States Representative for the 39th Congressional District of California, The Honorable Robert K. Dornan, United States Representative for the 38th Congressional District of California, and The Honorable Patrick L. Swindall, United States Representative for the 4th Congressional District of Georgia. The Congressmen are concerned by the potential chilling effect invalidation of Louisiana's balanced treatment legislation will have on academic freedom and scientific inquiry in the state-supported schools of the United States.

The Committee On Openness As a Principle Of Science represents over 700 scientists with advanced degrees from

disciplines of physical, medical and industrial science who affirm a policy of free and open discussion as a fundamental principle of scientific inquiry.

The Rutherford Institute, counsel for *Amici Curiae*, is a non-profit corporation named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is composed of attorneys, judges, physicians, law students, educators, and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. Through the efforts of its national office and eleven state chapters, the Institute undertakes to assist litigants and participate in significant cases relating to First Amendment freedoms. Counsel for *Amici Curiae* have specialized in litigation in state and federal courts and have participated as counsel for *Amici Curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

Statement Of Facts

Amici Curiae adopt by reference the statement of facts as set forth in Appellants' brief filed with this Court.

Summary of Argument

The argument for balanced treatment — that legitimate alternative scientific accounts of the origins question should not be arbitrarily excluded from the classroom — is powerful because it draws upon tenets of fair play and ideological openness basic to our democratic system. Yet as applied to support the inclusion of creation-science, that argument contains in its minor premise — the legitimacy of creation-science — the seeds of what would, if true, be a powerful, indeed a decisive, response: that creation-science is empirically spurious. Obviously, if creation-science is the modern equivalent of empirically spurious propositions such as "the earth is flat," then it need not (and should not) be a part of classroom discussion. Creation-science proponents have, in turn, responded to the empirical critique of creation-science with a vigorous defense of its legitimacy. This focus on legitimacy tends,

however, to elide the principal legal issue, which is whether the nature of the controversy is empirical or interpretative within the meaning of First Amendment decisional rules dependent on those concepts.

The First Amendment presupposes a fact/ideology distinction. A proper understanding and definition of this distinction are critical to the First Amendment because this distinction enables the government to alternate between two completely opposed roles — government as enforcer of truth and government as neutral observer of ideological controversy — in relation to matters of truth and falsity. The fact/ideology distinction serves as a sort of cueing mechanism that signals the government when to drop one posture and to assume the other. The content of the distinction, therefore, bears careful scrutiny and definition.

Fortunately, the structure of the distinction is not peculiar to constitutional law but derives from basic epistemological premises associated with the dominant post-Kantian or modern view of interpretation and meaning. That view recognizes a contingent separation between interpretation and reality perhaps best captured by such dualities as fact/interpretation, data/hypothesis, text/meaning, and, of course, premise/reasoning. It concedes the potential for indeterminacy in interpretation, but establishes a conceptual ground from which interpretation can proceed. This dualistic aspect to interpretation is important because it permits the proliferation of meanings without denying the possibility of meaning itself.

Considering the nature of the origins controversy in light of this epistemological understanding, it becomes apparent that the controversy is most definitely not empirical but involves classic issues of interpretation. Because the controversy falls on the interpretative side of the duality, its resolution by government cannot be justified except by repudiating the major epistemological premises of modern thought (by ascribing to things previously considered ideological the empirical label) or by repudiating the First Amendment itself (by asserting that some ideological matters are beyond its purview).

ARGUMENT

I.

The Traditional Way Of Evaluating The Legal Implications Of The Origins Controversy Presupposes An Epistemology At War With The Epistemological Premises Of The First Amendment.

The obvious irony in the reversal of roles that finds creation-science proponents playing Scopes in a modern version of the origins controversy (in which "Scopes" is denied a trial) is at once the source of powerful equitable arguments in favor of creation-science as well as of powerful misimpressions that make those arguments seem contrived and illegitimate. The arguments against dogmatism and in favor of freedom of thought that won once, *Epperson v. Arkansas*, 397 U.S. 97 (1968), and indeed describe a central premise of our democratic system, *see generally* A. Mieklejohn, *Free Speech and Its Relation to Self-Government* (1948); Bork, *Neutral Principles And Some First Amendment Problems*, 47 Ind. L.J. 1 (1971), ought still to win, or so it would seem. Yet the historic and cultural narratives associated with the creation-evolution controversy present a powerful, if inarticulate, challenge to the claim of proponents of creation-science to represent freedom of thought. *Cf. McLean v. Arkansas Board of Education*, 529 F. Supp. 1255 (E.D. Ark. 1982). In those narratives, creation comes across as propositional and didactic, as opposed to ideational, in character and, what is worse, as empirically spurious. *E.g.*, *Epperson v. Arkansas*, 397 U.S. 97 (1968). The putative propositional quality of creation-science makes the posture of its proponents in favor of freedom of thought seem insincere; the perception of creation-science itself as empirically spurious makes that posture seem altogether illegitimate (because it seems to depend upon an empirically erroneous scientific position).

A. The Traditional Pattern Of Argument Treats The Origins Controversy As If It Were, For First Amendment Purposes, Empirical And Thus Over-Determines The Legal Issues In Terms Of The Scientific Ones.

These perceptions set up a debilitating pattern of argument in which the key to the determination of the predictable claims and counterclaims is the empirical legitimacy of creation-science. The state in this case makes the opening and superficially powerful move, staking out a position in favor of (but not requiring) balance, *see* La. Rev. Stat. Section 17:286.1 *et seq.*, that is, in favor of the presentation of alternative views or ideological openness. This move is, in essence, an appeal to the democratic tradition of free competition in the marketplace of ideas. Indeed, the point of the state's argument is something approaching an axiom in American political thought: that both sides of an issue ought to have a fair hearing. *But cf. CBS v. Democratic Nat'l Committee*, 412 U.S. 94 (1976). But the response—which is suggested by historic narratives in which erroneous propositions maintained by religious groups are pitted against intellectual advances—is just as powerful; namely, that in the discussion of scientific issues, there is no obligation to discuss or treat as legitimate empirically invalid and scientifically discredited propositions.

Thus, the public schools should not be required to air the proposition that the earth is flat as an alternative to the view that the earth is round just because some (wrongly) believe it to be the case. It follows that if creation-science is analogous to propositions such as "the earth is flat," it need not (and should not) be presented either. In such case, presentation of creation-science in public schools might also raise establishment clause concerns. For this reason, the explicit critique of creation-science as empirically spurious, together with the cultural and historic narratives that amplify and support that critique, seem to require a defense of creation-science in scientific or em-

pirical terms. This pattern of argument, therefore, makes the legal issues seem to depend, in the final analysis, upon the outcome of the scientific dispute.

This misconceives the nature of the scientific controversy and the way in which the scientific issues relate to the legal ones. Being predicated upon this fundamental misconception, the above pattern of argument almost completely distorts the principal issues in the case. For although science has an undeniable as well as an important role in describing the context from which the legal issues take their shape, its relevance lies not in showing whether creation-science is empirically legitimate, but in showing that the legitimacy of creation-science does not depend upon empirical claims.

Yet the definition of what counts as empirical cannot come from science; it is, rather, an epistemological matter. Hence, one must call upon an epistemological understanding to supply the definition of empirical; science can then give it content in terms of the creation-evolution controversy. Doing this, however, reveals that the emphasis of the traditional approach to the creation-evolution controversy on the empirical validity of creation-science is misdirected, not because empirical validity is not relevant, but because such an approach views the controversy through the grid of an epistemology at war with the epistemological premises of the First Amendment.

B. The First Amendment Depends, For Certain Of Its Limitations, Upon An Epistemological Understanding.

1. Although The First Amendment Is Primarily Based On A Political Theory Of The Role Of Government In Relation To Matters Of Truth And Falsity And Not Upon An Epistemological Understanding, It Depends Upon An Epistemology To Sort Ideological From Empirical Truth.

The First Amendment is not primarily explicable in epistemological terms. It is not a theory about the

discoverability of truth or the attainability of knowledge, though the effect of different political structures on the discovery of truth—the consideration of truth as an instrumental aim—has probably always figured in the constitutional calculus that informs the contours of the First Amendment. *See, e.g., Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (recognizing importance of means and ends in First Amendment law); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). Rather, the First Amendment has been primarily shaped by a political theory about the legitimacy of governmental classifications that purport to divide between truth and falsity. *See generally* Meiklejohn, *The First Amendment Is An Absolute*, 1961 Sup. Ct. Rev. 245. That theory assigns government a role outside of ideological controversy. It denies government the authority to interfere in the competition among ideas. It denies, in short, the right of government to impose on society its view of truth and falsity in ideological matters.

The belief that government should not impose its views on society is a political, not an epistemological, axiom. It is not predicated upon the view that truth and falsity are unknowable but upon a political theory about the relationship of government to ideological controversy. Nevertheless, political theory itself depends upon a view of reality and hence, to some degree at least, upon a view of its knowability. As a consequence, the First Amendment necessarily embraces epistemological premises. These appear in the form of First Amendment doctrines that make distinctions between truth and falsity constitutionally significant and thus assume the possibility of making such distinctions in at least some contexts.

For example, the law of libel presupposes the possibility of a governmentally enforced distinction between truth and falsity. *See N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). Similarly, the rationale that justifies greater regulation of commercial speech than is permissible for political speech is tied to the supposedly greater verifiability of the truth of

commercial statements. *See Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Central Hudson Gas and Electric Corp. v. Pub. Service Comm'n.*, 447 U.S. 557 (1980). Indeed, SEC regulation of corporate reporting, FTC regulation of advertising, and many other forms of government regulation of private commercial transactions, including even the notion of fraud in contract doctrine itself, rest on the ability to draw distinctions between true and false statements. The reconciliation of the First Amendment doctrines that allow such regulation with the political theory that holds truth and falsity to be outside the realm of government authority exposes a major epistemological premise of First Amendment law.

2. The Fact/Ideology Distinction Establishes Two Opposed Roles For Government In Relation To Matters Of Truth And Falsity—Government As Enforcer Of Truth And Government As Neutral Observer Of Ideological Controversy.

That premise has to do with the special character, from the standpoint of the First Amendment, of "factual" assertions as distinct from ideological claims: Facts are knowable; ideological or political truths are not knowable in the same sense (whether or not they are actually knowable). Indeed, all of the exceptions to, and qualifications of, First Amendment protection that permit the government to place its enforcement power behind its view of truth (and hence against what it perceives to be false) rest on this fact/ideology distinction. *Cf.* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 Vand. L. Rev. 265 (1981) (discussing necessity for similar speech-nonspeech distinction). The precise nature of the fact/ideology distinction is critical because it enables the government to alternate between two completely opposed postures—government as enforcer of truth and government as neutral observer of ideological controversy—in

relation to matters of truth and falsity. The fact/ideology distinction serves as a sort of cueing mechanism that signals the government when to drop one posture and to assume the other.

a. An Overbroad Definition Of Empirical Fact Expands The Role Of Government As Enforcer Of Truth And Reduces *Pro Tanto* First Amendment Protections.

The obvious danger is that too broad an understanding of "factuality" will license the government to step in as enforcer of truth, to place the power and prestige of government behind a particular view, and thereby to undermine substantially freedom of thought in a particular area. The ability to label an area of thought "factual" carries with it the power to withdraw that area of thought from the coverage of the First Amendment. Nor can we expect government to be neutral as to the choice between the two postures.

b. Majoritarian Pressures Operate To Narrow The Definition Of Ideology.

As Professor Emerson has pointed out, the dynamics of the limitation process—the process by which the First Amendment is translated from an abstraction out of the pages of the *U.S. Reports* into an operative limitation on government—will inevitably work to contract the area of protection. Emerson, *Toward A General Theory of The First Amendment*, 72 Yale L.J. 877, 887-93 (1963). Majoritarian forces within the political system will push against the boundaries that define the area of protection. *Id.* Constitutional design must make allowances for these pressures. The concept of chilling effect has, for example, been employed in this manner to broaden the area of First Amendment protection beyond what might theoretically be prescribed, in order to allow for the impact of ambiguity. *Dombrowski v. Pfister*, 380 U.S. 479, 487 (1965); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 50 (1971) (Brennan, J., plurality opinion).

c. Majoritarian Pressures Against Idiosyncratic Ideologies Subtly Influence And Interact With The Fact/ Ideology Distinction To Reduce First Amendment Protections.

By definition, factual propositions are those about which there can be no legitimate disagreement. Hence, it makes sense to create an exception to First Amendment protection for matters involving fact, as opposed to ideology, because belief in such propositions is (or can, for purposes of the First Amendment, be defined to be) unanimous. Conversely, the existence of significant disagreement regarding the validity of a proposition implies a challenge to the claim that the proposition is factual. If a principal characteristic of factual propositions is unanimity of acceptance, then it may be reasonable to suppose a tendency within society to find that propositions about which there is virtual or even substantial unanimity are factual.

Such a tendency would, of course, be solipsistic, for it does not at all follow from the premise that facts receive unanimous acceptance that a proposition unanimously accepted is a fact. Historically, however, propositions such as "the earth is flat" have benefitted from precisely such reasoning. To the extent that such a tendency exists, it will work together with the already (by definition) great majoritarian pressures to preclude freedom of thought on such a matter by arming the majority with the perception that the matter is outside the First Amendment.

And apart from such a tendency, majoritarian pressure for a proposition will in any case tend to increase as the proposition actually aproaches factuality. *Ex hypothese*, majoritarian pressure against idiosyncratic views will be greatest at the borderline between fact and ideology, or, in other words, at the point where the definition of the fact/ideology distinction matters most. The definition of the distinction must take this tendency into account.

C. Treating The First Amendment Significance Of Creation-Science As An Empirical Matter Conflates Epistemological And Political Theory Issues And Allows Apparently Modest Adjustments In First Amendment Coverage To Obscure A Radical Shift In Epistemological Premises.

It is important to emphasize that, while the *significance* of such a distinction derives from a political theory concerning the sorts of things that should be protected, the *distinction itself* is epistemological. One can argue in political theory terms about the scope of the government's role as enforcer of truth and about whether it should extend to matters involving purely factual propositions, primarily factual propositions, or even to propositions with a significant ideological dimension, but one cannot begin the discussion without an epistemology that explains how factual propositions differ from ideological ones. As a consequence, views concerning the proper scope of the First Amendment are dependent for their meaning upon the content of this distinction. To put it another way, the view that a matter is factual and, therefore, not within the First Amendment is not a view that can be discussed in political theory terms; rather, it calls into question the epistemological premise to which we have been referring.

There is, however, a tendency, of particular relevance to the instant case, to conflate the two issues and to attempt to resolve the epistemological issue in terms of views relative to the scope of the First Amendment. In this manner, it is possible to indulge a radical shift in epistemological premises under the guise of relatively modest qualifications of the scope of the First Amendment. Focusing on the content of the fact/ideology distinction makes it clear that the creation-evolution controversy is not even arguably empirical within the meaning of that distinction. It therefore becomes clear that the legitimacy of an anti-creation-science rule permitting the exclusion of

creation-science from the classroom must depend upon either a radical shift in epistemological presuppositions (to a presupposition that ascribes to things previously considered ideological the characteristics of factual propositions), or a radical transformation of the First Amendment (in which some matters now conceded to be ideological would be considered beyond the purview of that Amendment).

II.

The Exclusion Of Creation-Science From The Classroom Cannot Be Justified On Empirical Grounds But Represents The Imposition Of Ideological Limitations On Interpretation And The Denial Of The Modern Understanding Of The Nature Of Interpretation.

The fact/ideology distinction implied by the First Amendment is not, happily, a distinction peculiar to constitutional law. On the contrary, its appearance in constitutional law is but an instance of the application of a more general concept, basic to all of modern thought, of interpretation and meaning.

A. The Dominant Post-Kantian View Of Interpretation Recognizes A Dualistic, Though Heavily Contingent, Separation Between "Reality" And Interpretation That Allows For The Proliferation Of Meanings Without Denying The Possibility Of Meaning Itself.

The dominant post-Kantian or modern view of meaning recognizes a separation between reasoning and premise,

though it nonetheless sees the interpretive act as dependent upon context. For an excellent descriptive account of the dominant form of dialectic, see Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 Yale L.J. 209 (1984) (Book Review).[2] This concept of meaning is perhaps best captured by such dualities as fact/interpretation, data/hypothesis, text/meaning, and, of course, premise/reasoning. What might be described as the passive side of these dualities — fact, data, text, premise — serves as a sort of "objective reality"[3] that provides a basis for interpretation to proceed. Interpretation itself is a way of ordering and perceiving reality. In the modern view, interpretation stands outside of and apart from, though it depends upon, reality.

The paradigm of interpretation involves the acquisition or accumulation of data, the development of a hypothesis to fit the data or facts, the testing or evaluation of the hypothesis by considering its fit with additional data or facts (or by testing its predictions against some additional data), and the revision of the hypothesis. In this paradigm, the separation between data or empirical fact and hypothesis is a major predicate to analysis and interpretation.

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[2]*See also* R. Bernstein, *Beyond Objectivism And Relativism: Science, Hermeneutics And Praxis* (1983). The argument here does not depend upon a particular view of philosophy but rather takes in what should be common ground to all except extreme nihilists and absolutists. To use the metaphor of reader and text, few still see meaning as wholly locked within "text"; on the other hand, most reject the extreme form of nihilism that sees all meaning as wholly within the mind of the "reader." Within these two extremes, there are significant philosophical variations on the nature of interpretation. Yet all of these embrace the dualistic aspect of interpretation described here. Hence, the argument advanced here follows unless one steps outside this general consensus into the extremes of nihilism or dogmatism. The extreme forms of nihilism are, however, epistemologically inconsistent with the First Amendment.

[3]This is not to say that it *is* (or is not) an "objective reality." The point of the present argument is not to take a particular philosophical

At the same time, the modern view emphasizes the indeterminacy and contingency of most interpretation. This indeterminacy arises in part out of the complex possibilities inherent in any ordering of reality. In historiography, for example, one faces the enormous interpretive problems of determining how far to restrict the field of data on which the historical interpretation will be based, of choosing from among the many different ways of reassembling, evaluating, and assigning significance to the data chosen, and so on. *See, e.g.*, R. Collingwood, *The Idea of History* (1956). These problems are, in a sense, replicated in literary theory. *Cf.* Abraham, *Statutory Interpretation and Literary Theory: Some Common Concerns of an Unlikely Pair*, 32 Rutgers L. Rev. 676 (1979) (comparing interpretive issues in law and literary theory); G. Kress and R. Hodge, *Language As Ideology* (1979).

Still, the distinguishing characteristic of modern thought is its emphasis on the duality of "text" and interpretation; despite the recognition of indeterminacy of meaning, there is also a belief in the functional or formal "objectivity" of the text or ground of interpretation, however much it might be obscured by the inevitability of perceptual biases. There is, in each field of thought, a

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(footnote 3 continued)

position on the subjectivity-objectivity debate, but rather to describe a basic feature of the form of modern dialectical thought. The concept of an object of interpretation as a separate formal construct, whatever its ontological status, is necessary for interpretation to proceed. The Kantian notion that reality is subjective, *see, e.g.*, I. Kant, *The Critique of Pure Reason* (N. Smith trans. 1929), is not inconsistent with the idea presented here. One can concede the contingency and indeterminacy of reality without denying its formal existence. The view presented here is, however, probably inconsistent with the more radical forms of nihilism.

rough analogue to what James Boyd White has called, in the context of literary theory, the Ideal Reader.[4]

This dualistic aspect of modern attempts at discovering meaning is critical because it permits the proliferation of meanings without denying the possibility of meaning itself; it enables the interpretive process to avoid the polarities of dogmatism and nihilism. By resisting the temptation to arbitrary closure of the interpretive process, it steers clear of artificial, if sometimes reassuring, limitations on meaning. Yet the belief in a "text" rescues interpretation from the absence of any boundaries and hence of any meaning.[5]

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[4]*See* J.B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (1984); Fiss, *Objectivity and Interpretation*, 34 Stan. L. Rev. 739 (1982); *see also* W. Iser, *The Act of Reading* (1978). The metaphor of "reader" and "text," which plays upon the quintessential form of interpretation, may be used to describe dynamics of the interpretive process common to all forms of interpretation. A principal and well-recognized characteristic of interpretation is the interactive quality of the encounter between "reader" and "text." The meanings a "reader" sees, as well as those he denies, are inextricably linked to his own world view, which makes some meanings more, and others less, plausible. For a given reader or community, therefore, the range of meanings will always be more limited (and, depending on the reader, sometimes exceedingly so) than the universe of meanings. Data is, in general, pliable and open to meaning. In the context of the community, however, cultural consensus eliminates some interpretations and exalts others. That these observations hold true for science, as well as for other forms of interpretation, has been convincingly shown by Kuhn. *See* T. Kuhn, *The Structure of Scientific Revolutions* (2d ed. 1970). As Kuhn puts it, "Scientific knowledge, like language, is intrinsically the common property of a group or else nothing at all." *Id.* at 210.

[5]It does not, of course, assure that any one interpretation will obtain final legitimacy, because the question of authoritativeness in interpretation involves different considerations than does the question of meaning.

B. The Seeming Unassailability Of Scientific Propositions Such As Evolution Is Made Possible By The Same Separation Between Hypothesis And Data Which The Claim To Unassailabilty Tacitly Denies.

The dualistic meaning of interpretation and the notion of objective reality are, if anything, more clear in science than in any other field. Indeed, the pejorative "soft sciences," sometimes used to distinguish disciplines such as sociology from the physical sciences, reflects the sense of greater, or perhaps real, objectivity some associate with the physical sciences as compared to other disciplines. The concept of the separation between empirical data and hypothesis is, therefore, a basic cornerstone of modern science, for it is the ostensibly objective character of the empirical data against which hypotheses are tested (and by which they are confirmed) that provides the foundation for the claim of objectivity. Yet, at the same time, this objective quality of the physical sciences has in recent history contributed to a sense of the unassailability of scientific propositions. *But see* T. Kuhn, *supra*. This hubris has, in turn, blurred the distinction between empirical data and hypotheses.

Whatever legitimacy the argument from empirical data to the unassailability of scientific propositions may have in other contexts, it is conspicuously lacking with regard to the origins controversy. Neither theory of origins can make the connection to objectivity that fuels the confidence of the physical sciences in other respects, because neither creation-science nor evolution can be directly tested. This is not to say that they cannot be defended in terms of empirical data. On the contrary, it is the essence of a hypothesis that it be able to account for empirical observations.

C. The Controversy Over Origins Is Non-Empirical Within The Meaning Of The Modern View Of Interpretation.

The core of the evolutionary model is the thesis of macro-biological evolution, that is, the thesis that man has evolved from a simple one-cell structure through various intermediate stages, including fish, amphibians, reptiles, birds, mammals, and primates, to its present state. In regard to the validity of macro-evolution, the most direct evidence is the fossil record. Darwin himself considered the fossil record the ultimate test of his theory. C. Darwin, *The Origin of Species* 280 (Gillespie 1979).

The fossil record comprises the principal empirical data with which any view of origins must contend (in relation to the question of macro-biological creation or evolution). Because the controversy over creation-science and evolution is usually cast as an empirical controversy, it is worth pointing out that there is relatively little, if any, controversy between creation-science and evolution over this empirical data. The controversy exists, rather, on the interpretive side of the duality. Both evolutionists and creation-scientists offer hypotheses that purport to account for the fossil record.

Far from being implausible, the hypothesis of creation-science is directly supported by the data. In particular, the conspicuous absence of huge numbers of transitional forms demonstrably fits the hypothesis of creation and seriously undermines the evolutionary hypothesis. The fossil record saddles evolutionists with what might be called the "18 million year gap." Again, however, the validity of either theory is not legally relevant.[6] Rather, it

[6]One can obviously require that any hypothesis proffered as a candidate for classroom discussion be intellectually plausible. Yet in evaluating the plausibility of interpretation, it is important not to confuse ideological dissonance with intellectual implausibility. We do not, for example, see how it can be maintained that the special creation account of the fossil record is not *intellectually* plausible, though it can doubtless be disputed. It cannot in any case be shown to be false.

is the nonempirical status of both theories of origins, the status of both as hypotheses, that is critical.[7]

(footnote 6 continued)

However, to one indoctrinated in the evolutionary viewpoint creation-science may *seem* implausible because of the tendency of every "reader," well known to students of interpretation and hermeneutics, to project into a "text" his own (pre-conceived) meanings. In the case of an individual who holds the evolutionary viewpoint, the phenomenon of projection (of presuppositional meaning into data) will lead him or her to minimize significant gaps between the evolutionary hypothesis and the empirical data and, at the same time, to discount the creationist's account of the data. Leading evolutionists have candidly acknowledged the compulsion artificially to conform the data to evolutionary hypotheses. As Colin Patterson, senior paleontologist at the British Museum of Natural History in London, has explained:

> Last year I had a sudden realization. For over twenty years I had thought I was working on evolution in some way. One morning I woke up and something had happened in the night; and it struck me that I had been working on this stuff for twenty years and there was not one thing I knew about it....So for the last few weeks I've tried putting a simple question to various people and groups of people....Can you tell me anything you know about evolution, any one thing, any one thing that is true?...All I got...was silence....
>
> The absence of answers seems to suggest that...evolution does not convey any knowledge, or, if so, I haven't yet heard it....I think many people in this room would acknowledge that during the last few years, if you had thought about it at all, you have experienced *a shift from evolution as knowledge to evolution as faith*. I know that it's true of me and I think it is true of a good many of you here....Evolution not only conveys no knowledge but seems somehow to convey antiknowledge.

C. Patterson, Speech delivered at American Museum of Natural History, New York, New York (July 5, 1981) (emphasis added).

[7]The truly tentative nature of the evolutionary hypothesis is exemplified in the recent abandonment by leading evolution scientists of the belief in gradualism and the adoption of the belief in punctuated equilibrium. Indeed, the concept of punctuated equilibrium is an attempt to explain the absence of transition forms by the supposition of extraordinary, periodic mutations resulting in new life forms. On a conceptual level, punctuated equilibrium is virtually a euphemism for special creation.

D. The Exclusion Of Creation-Science From The Classroom Would Involve The Imposition Of Ideological Limitations On Meaning And Would, Therefore, Violate The First Amendment.

Once it is clear that we are dealing with hypotheses, it is also clear that we are dealing with a process of interpretation and meaning. And all of modern thought — from historiography to moral philosophy — recognizes that interpretation and meaning are unavoidably, though not perhaps fatally, burdened with ideology. To deny this is to deny the intellectual developments of at least the last century.

In this context, to exclude discussion of certain plausible hypotheses is to impose an ideological constraint on the process of interpretation. Indeed, to impose such a constraint on account of the consonance of creation-science with the Bible is to engage in a palpably ideological act. What is more, such an act is irreconcilable with the establishment clause, which prohibits the inhibition of religion as well as its advancement. *E.g.*, *Everson v. Board of Education*, 330 U.S. 1 (1947).

There is, of course, a strong psychological tendency to seek closure in relation to questions of meaning. The urge to exclude a competing account of our origins is thus understandable. However, the First Amendment requires us to conquer this yearning for closure; it is the teaching of all of liberal political and philosophical thought, as well as the requirement of our form of government, that we master the fear of interpretations that pose a threat to our world view and overcome the visceral (one is tempted to say prehensile) urge to intolerance.

CONCLUSION

The question whether creation-science will be arbitrarily excluded from the classroom is a question that poses a challenge to the most basic premises of our system. It is

indeed a test of the integrity of liberal political and philosophical thought. It is a test of liberalism not merely because our system requires opposing viewpoints to receive equal time in the classroom (it clearly does not require that), but because the exclusion of creation-science cannot be justified except by repudiating either the major epistemological premises of modern thought, or by repudiating the First Amendment itself.

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